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No. 96-1321

In The Supreme Court of the United States

October Term 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,
v.
AMY COHEN, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals for the First Circuit

BRIEF OF 60 COLLEGES AND UNIVERSITIES AS AMICI CURIAE IN SUPPORT OF PETITION

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INTEREST OF THE AMICI CURIAE

Amici Curiae respectfully submit the within Brief in support of the Petition of Writ of Certiorari, the written consent of each party having been obtained and filed with the Clerk of this Court.

Amici Curiae are an *ad hoc* group of 60 colleges and universities representing a broad cross section of American post-secondary educational institutions. Each amicus receives federal financial assistance and, therefore, is subject to the mandates of Title IX. Each amicus is concerned by the decision of the United States Court of Appeals for the First Circuit ("First Circuit") in that compliance with the First Circuit's interpretation of Title IX as applied nationwide by the Office For Civil Rights ("OCR") has and will require extensive and costly modifications to its educational programs including, but not limited to, its varsity athletic programs.

The diversity of amici illustrates why it is important for this Court to grant Brown University's petition for a writ of

certiorari so that clear and appropriate standards for compliance with Title IX may be applied across the country. Amici include other private schools, both large and small, including Brandeis University, Clark University, Colgate University, Emory University, Fairfield University, George Washington University, Johns Hopkins University, Lehigh University, New York University, Northwestern University, Tulane University, the University of Miami, the University of Southern California, and Wake Forest University.

Schools with a religious orientation also are participating as amici, including Baylor University, Boston University, Brigham Young University, College of the Holy Cross, Duquesne University, Muhlenberg College, Saint Louis University, Saint Peter's College, Southern Methodist University and the University of Notre Dame.

Finally, the amici include a group of state or state-related institutions such as Arkansas State University, Ball State University, Louisiana State University, New Mexico State University, Oklahoma State University, the eight universities which comprise the Texas State University System, the University of Arkansas, the University of Illinois, the University of Missouri, the University of Nebraska, the University of New Mexico, the University of Pittsburgh, the University of Tennessee, the University of Tulsa, West Virginia University and the 14 universities which comprise the Pennsylvania State System of Higher Education.

Thus, the colleges and universities which urge the Court to grant Brown's petition for a writ of certiorari include schools of all types and sizes and throughout the country. It is

unusual for such a large and diverse group of colleges and universities to join in asking this Court to review a particular case. Nevertheless, this group has come together to make that request here because the decision of the First Circuit in this case has changed the meaning of Title IX in a way contrary to the express language of the statute. Moreover, the decision has had nationwide import because it has been applied nationwide by OCR. Thus, this case is an unusually appropriate one for this Court to review.

Until recently, educational institutions subject to Title IX relied upon the explicit provisions of Title IX which forbid the use of quotas.[1] Further, for many years the OCR, which administers Title IX compliance, has explained that institutions are required to "meet the interests and abilities of women to the same degree as they meet the interests and abilities of men" and that educational institutions are "not require[d] ... to offer ... intercollegiate participation opportunities" that are proportional

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1 Section 901(b) of Title IX provides as follows:

> Nothing contained [therein] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.

20 U.S.C. §1681(b).

to the "division by sex of the total student enrollment."[2] After the First Circuit's decision in this case, however, the OCR in 1996 adopted the position of the First Circuit that a statistical imbalance can establish a Title IX violation.[3] Thus, until the First Circuit's decision and the OCR's recent change in its interpretation of Title IX, educational institutions were not required to establish the same proportion of varsity positions as the ratio of sexes in their student body in order to conform to Title IX. If the First Circuit's interpretation and the new OCR position were to become the standard under which Title IX compliance is measured, educational institutions will need to make far reaching changes in their athletic and other educational programs.

The confusion and compliance difficulties mandated by the First Circuit's decision and the recent OCR's adoption of the First Circuit's position are not confined to athletics because the overall scope of Title IX's application in recent years has broadened considerably. Following this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), Congress passed the Civil Rights Restoration Act of 1987 and legislatively overturned the *Grove City* decision.[4] In *Grove*

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2 OCR Title IX Intercollegiate Athletics Investigator's Manual at 122 (1980), App. 291a-293a.

3 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, dated January 16, 1996, App. 294a-316a.

4 The Civil Rights Restoration Act of 1987 added a new section to Title IX defining a program as including a "college,

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City, this Court determined that the reach of Title IX was program-specific. The Civil Rights Restoration Act of 1987 extended the reach of Title IX to all aspects of an educational institution receiving federal financial assistance, not just the specific program that was receiving the financial assistance. Thus, with the implementation of the Civil Rights Restoration Act of 1987, Title IX's reach was considerably expanded. Receipt of federal funds by any part of a college or university now requires Title IX compliance throughout the college or university. An educational institution now needs to design compliance procedures for all of its programs. Thus, the inherent dangers contained in the First Circuit's statistical quota approach may create considerable confusion concerning the compliance obligations well beyond varsity athletic programs.

Accordingly, amici urge review by this Court to clarify the fundamental concept of discrimination that will be applied under Title IX. Well-meaning educational administrators will have to determine whether to accept the numerical balancing approach of the First Circuit. If they do so, considerable reallocation of scarce educational resources will need to be made either to increase female varsity athletic positions and/or to decrease male varsity athletic positions. With diminishing sources of funding for such programs, decisions to disband or to curtail athletic programs may need to be made. Considerable long-term harm can occur to established athletic programs in

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university, or other postsecondary institution, or a public system of higher education." *See* 20 U.S.C. §1687(2)(A).

order to comply with the First Circuit's interpretation of Title IX. New programs established to conform to this new statistical quota approach can take years to establish and subsequently may need to be abandoned if this new statistical quota approach is finally rejected. In this situation, a review by this Court of the "rules of the game" is necessary so that compliance obligations can be understood.

No one doubts that considerable strides have been made in women's athletics since Title IX was enacted. However, with the OCR's acceptance of the First Circuit's interpretation and with the expansion of the reach of Title IX, it is now necessary that the fundamental goal of Title IX be defined by this Court. Does Title IX require that an educational institution assure that varsity athletic positions mirror the student population, or does Title IX require that, in allocating athletic opportunity, an educational institution disregard the factor of sex? Do we as a society recognize that males and females can have different levels of interest, which could explain a given statistical result? Does Title IX require equal accommodation of the varying interests of men and women or does it require that resources be allocated strictly on the basis of the numbers of each sex in a student body, regardless of interest?

Only this Court can definitively answer these fundamental questions posed by the First Circuit's decision in this case. Only this Court can define what Congress meant when it prohibited discrimination "on the basis of sex" in Title IX. Only this Court can provide definitive guidance on the meaning of Title IX.

It is for these reasons that these numerous and diverse colleges and universities have joined to ask this Court to review this case.

REASONS FOR GRANTING THE WRIT

The question presented in this case is the fundamental definition of discrimination under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.*[5] This Court needs to review this case and to provide guidance to the lower courts on what Congress meant when it prohibited discrimination in educational programs on the basis of sex. The question presented is whether an educational institution fulfills Title IX's mandate when it equally accommodates the interests of its male and female athletes or must a school have the same proportion of male and female varsity athletic positions as the proportion of males and females in its student body, regardless of any varying levels of interest in such athletic positions.

In a two to one decision, with Chief Judge Torruella dissenting, the First Circuit determined that a statistical disparity between the percentage of females in a student body and the percentage of female varsity athletic positions establishes a violation of Title IX. The only defenses recognized by the First Circuit were if an educational institution

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5 Section 901(a) of Title IX provides that no person shall be excluded from, denied the benefits of or subjected to discrimination "on the basis of sex" under any educational program receiving Federal financial assistance. 20 U.S.C. §1681(a).

can demonstrate a history and continuing practice of program expansion for the underrepresented group or a full accommodation of the underrepresented group in its educational program. In making this holding, the First Circuit assumed that any statistical disparity between the student body and athletic participation was the result of discrimination. The First Circuit rejected Brown University's attempt to explain that the disparity was the result of other causes, for example, different levels of interest. The First Circuit dismissed as irrelevant Brown's attempt to explain the disparity as due to differences in interest level.

> We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men.

App. 42a.

The implications of this holding are far reaching, both as to the legal standards for Title IX compliance and as to the effect upon educational institutions trying to administer their athletic programs. Post-secondary educational institutions have made enormous strides in increasing athletic opportunities for women. With the inherent competition between male and female athletic programs for scarce economic and other resources, it is necessary to clarify the fundamental question presented in this case. Except for remedial measures after liability has been established, our civil rights laws have never required the kind of proportionate allocations or quotas used by the First Circuit.

The First Circuit's Decision Is Contrary To And Conflicts With Decisions Of This Court.

Contrary to the wording of Title IX which does no more than prohibit discrimination "on the basis of sex," the First Circuit's decision virtually eliminates the requirement of causation, *i.e.* that the reason for the disparity be sex discrimination. Instead of the clear statutory wording, the First Circuit held that a statistical disparity establishes a Title IX violation and that the only defenses are that a college or university has a history and continuing practice of program expansion for female athletes or that female athletes have been fully accommodated in the athletic program. These "defenses," however, are in effect nothing more than a recognition that Title IX compliance will take time and that educational institutions need not create or preserve programs for an underrepresented group that are not viable because of lack of interest. The polestar of a violation remains the fact of a statistical disparity, regardless of cause. Under this definition of discrimination, the issue is not whether the abilities and/or interests of male and female athletes are equally accommodated but whether each group gets its quota of the available varsity positions as measured by their percentage in the student body.

This new definition of "discrimination" is contrary to the long line of civil rights cases decided by this Court which consistently have required that a plaintiff prove that a prohibited factor caused the harm under attack. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). In approving the use of statistics as evidence of discrimination, this Court has

recognized that statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted" and that "their usefulness depends upon all of the surrounding facts and circumstances." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977).

In determining the usefulness of statistical evidence, this Court has required that the statistical evidence be refined as much as possible to eliminate other potential explanations for a disparity. *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977). Raw, bottom line statistics which fail to identify the pool of qualified applicants have been rejected because they fail to permit an inference from a mere statistical imbalance. *Id.* The purpose is to assure the offending test, criteria, selection device, decision, etc. is identified and that an inference of discrimination is appropriate. This Court has rejected "bottom line" statistics where a plaintiff has attempted to use such statistics offensively. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (Plaintiff must establish a causal link between a specific employment practice and the observed disparities). This Court has also rejected "bottom line" statistics where a defendant attempted to use such statistics defensively. *Connecticut v. Teal*, 457 U.S. 440 (1982). As with any other evidence, a defendant may challenge the statistics or explain the disparity by pointing to other causes for a statistical disparity. *Teamsters, supra.* The evidentiary inquiry is whether the statistics are sufficiently tailored to

support an inference of discrimination. *Hazelwood School Dist., supra.*[6]

Without proper tailoring, statistical evidence is not meaningful and does not permit an inference of discrimination. Although decided under the "disparate impact" theory available under Title VII,[7] this Court's decision in *Wards Cove, supra,*

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6 In addition to turning a blind eye to varying levels of interest as a potential explanation for the statistical disparity, the "bottom line" statistical parity required by the First Circuit's decision fails to take into account differences in varsity athletic programs permitted under the OCR's regulations. The OCR's regulations permit educational institutions to operate single sex teams in contact sports. *See* 34 C.F.R. §106.41(b). Thus, if a school has a male varsity football team, a contact sport which requires a large squad of male athletes, the "bottom line" statistics will be skewed by this large number of varsity positions. Against this backdrop of permitted single sex teams in contact sports, as Chief Judge Torruella explained in his dissent, "it does not make sense to include in the calculus athletes participating in contact sports that include only men's teams." App. 70a-71a.

7 The "disparate impact" analysis is available under Title VII of the Civil Rights Act of 1964 because of the specific language of Section 703(a)(2), 42 U.S.C. §2000e-2(a)(2), which forbids employment practices that "adversely affect" an employee's status because of sex. In contrast, Section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), specifically forbids discrimination in employment terms "because of" an individual's sex, what is commonly called "disparate treatment." Like Section 703(a)(1) of Title VII, Title IX forbids discrimination "on the basis of sex" and, unlike Title VII, Title IX contains no comparable "disparate impact" provision. Thus, if anything, Title IX, by its terms, presents less justification than Title VII does for the "statistical parity" approach of the First Circuit. Moreover, as summarized *supra*

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illustrates the problem. In *Wards Cove*, this Court reversed a determination of liability based upon a statistical imbalance between the percentage of non-white workers occupying skilled positions and the percentage of non-white workers occupying non-skilled positions. This Court specifically rejected this comparison and held that a bottom line racial imbalance in an employer's work force does not establish a prima facie case of disparate impact. In requiring that a plaintiff identify and statistically isolate a specific employment practice, this Court explained:

> Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson v. Fort Worth Bank & Trust, supra,* 487 U.S. at 992, 108 S.Ct. at 2787.

490 U.S. at 657.

This same problem exists in this case. Brown University was not permitted to introduce as an explanation for

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in discussing *Wards Cove* and *Teal*, this Court did not even permit, under Title VII's disparate impact analysis, the type of "bottom line" statistical approach adopted by the First Circuit.

the statistical disparity the considerable evidence[8] it had that women students did not have the same level of interest in varsity athletics as men students. As in *Wards Cove*, this meant that Brown University could be "potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances.'" *Id.*

Under the First Circuit's approach, the statistics are not merely one form of evidence of discrimination, but are conclusive proof of liability, regardless of any explanation. Used this way, the statistics are nothing more than a quota.[9] They are not means to an end, *i.e.* evidence used to prove discrimination. They are the end, *i.e.* discrimination is found regardless of any other explanations for an alleged disparity. No civil rights statute has ever been interpreted by this Court in such a manner.

Equally troubling is the fact that achieving statistical parity between enrollment and varsity positions was held by the First Circuit to establish compliance with Title IX. "[A] university ... may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." App. 181a. Just as this Court rejected in *Wards Cove, supra*, "bottom line" statistics as establishing discrimination, this Court has rejected "bottom line" statistics

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8 *See* fn. 30 in Chief Judge Torruella's dissent which summarized this evidence, App. 82a.

9 Chief Judge Torruella in his dissent convincingly explains why the "legally cognizable characteristics that render a quota scheme impermissible" are present "in spades." App. 76a-80a.

as a defense. *Connecticut v. Teal*, 457 U.S. 440 (1982). Surely it is not difficult to imagine situations where individuals could be deprived of the benefit of a federally financed educational program on the basis of sex where, at the same time, a college or university had met the First Circuit's requirement of statistical parity. Staying on the "sunny side" of Title IX by compliance with such statistical parity as espoused by the First Circuit should no more insulate a school from Title IX liability than statistical parity should absolve the employer involved in *Teal*. One of the central tenets of *Teal* was that Title VII protects each individual, not merely groups, from discrimination. *See Teal*, 457 U.S. at 454-56. "Every individual employee is protected" against discrimination. *Id.* at 455-56 (emphasis in original). Title IX demands no less when it states that "no person" can be deprived of the benefits of federally financed educational programs. The insidious nature of a "bottom line" approach is contrary to Title VII and Title IX, regardless of whether used to establish liability or a defense.

In short, the First Circuit has transformed Title IX from a statute of equal opportunity into a statute of equal result. Compliance can be achieved only by assuring that there are no differences in results, working to eliminate any differences in results, or assuring that no member of the underrepresented group has a reason to complain, *i.e.* their interests have been fully accommodated. Under this approach, men's and women's athletic interests need not be equally accommodated. Any differences in athletic interests are deemed irrelevant because, in the First Circuit's view, it would undermine the First Circuit's perception of the purpose of Title IX, increasing the participation rates of women athletes. App. 34a-35a.

While increasing the participation ratio of women athletes may be a laudable goal, Congress chose only to ban discrimination "on the basis of sex." The statute clearly so states. If Title IX is not confined to sex discrimination, *i.e.* judgments made by educational administrators "on the basis of sex," courts will become embroiled in reviewing what are essentially educational decisions, *i.e.* what programs to offer. Like business decisions under Title VII, educational decisions under Title IX should be free of judicial review unless they are made on the basis of sex. The First Circuit's decision represents an unwarranted intrusion upon educational decisionmaking without requiring that any differences in treatment be "on the basis of sex." If other explanations for any statistical imbalance, such as varying levels of interest, cannot be considered, Title IX becomes nothing more than a government-mandated quota. Differences in results, differences in the bottom line, do not necessarily equal differences in treatment on the basis of sex.

The Issues Presented By This Petition Are Of Exceptional Importance And Have Far Reaching Implications For Title IX Enforcement.

In addition to the fundamental nature of the issue presented here, the implications to students and educational institutions merit review at this time. Athletic programs take years to establish. A viable athletic program simply cannot be created overnight. It requires recruiting talented athletes at lower levels of the educational process. It requires decisions by talented athletes about where to matriculate, frequently on the basis of the prior success of a given athletic program. It requires adequate facilities and equipment, which may need to

be constructed. It requires the proper training and conditioning of athletes. It requires a proper coaching staff. In short, the build up of an athletic program, whether for men or women, takes time.

In contrast, the athletic "life expectancy" of the students for whom these programs are established is quite limited. The typical college athlete has a short time upon the stage of college athletics. Eligibility for college athletics is generally restricted to no more than four years of competition. Injuries, other pursuits, and competition for available roster spots may materially shorten the typical four-year window of athletic opportunity.

In this context of long lead times and short periods of opportunity, it is important that educational institutions have guidance on a fundamental question such as is presented here.

If this Court decides to let the debate percolate, educational administrators will have to decide whether to comply with the First Circuit's and the OCR's new definition of discrimination. At present, few athletic programs provide the parity between female enrollment and female varsity athletic participation set forth in the First Circuit's and latest OCR's definition of Title IX discrimination. The establishment of viable female athletic programs will require long lead times. Resources will have to be found for these programs, in some cases through the dismantling of male athletic programs. If years from now, this Court decides that the First Circuit's analysis was in error, considerable disruption and lost opportunities for students of both sexes will have occurred.

In addition to the difficulties presented by the long lead times to establish viable athletic programs and the short careers of college athletes, consideration now is desirable because of the way in which these Title IX cases are adjudicated. In most cases, the plaintiffs seek injunctive relief at an early stage of the proceeding. District courts, recognizing that the issue for a college athlete may be moot by the time an ultimate decision is rendered, frequently entertain such requests for injunctive relief. As a practical matter, the preliminary injunction hearings may be the "whole ball game." Indeed, this is exactly what happened in this case. Similarly, even if relief is ordered, the situation may change as the litigation progresses, necessitating that the trial courts revisit any injunction issued. *See, e.g., Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993) (not an abuse of discretion for the district court to refuse to modify preliminary injunction when four of six female gymnasts who sought injunction graduated and proposed modification, dropping female gymnastics and starting female soccer team, would increase overall female participation). Delicate questions as to the scope and nature of relief are present and lower courts will need to be careful that they not micro-manage college athletic programs. *See, e.g., Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993) (district court exceeded its authority in demanding that softball team play fall exhibition schedule). The fact that these cases are often decided at the preliminary injunction stage and the delicate balancing questions that district courts will face in administering Title IX necessitate that this Court establish guidance on this core issue under Title IX, the definition of discrimination.

CONCLUSION

Throughout the modern era of civil rights litigation, this Court has been required to answer some fundamental questions on what our civil rights statutes mean. This case presents one of those fundamental questions. The issue is not procedural; it is substantive. It is, in fact, the very concept of what is meant under Title IX when Congress forbade discrimination on the basis of sex.

The approach taken by the First Circuit, proportionality, presents significant difficulties. Primarily, it fails to recognize that other innocent causes, most notably varying levels of interest in varsity athletics between men and women, might be an explanation for the lack of proportionality. The First Circuit's refusal even to allow consideration of evidence on varying levels of interest illustrates why this case is not merely an argument over one school's compliance with Title IX. The First Circuit and the OCR in its January 1996 reinterpretation of Title IX have fundamentally changed Title IX. As Chief Judge Torruella explained in his dissent, "Title IX is not an affirmative action statute but ... that is exactly what the district court has made of it." App. 76a. Failure to meet some numerical test should not establish an unrebuttable Title IX violation. The issues involved are more complicated than that. Moreover, the First Circuit's approach is a stark departure from this Court's holdings in other civil rights litigation.

On such a fundamental question as is presented in this case, only this Court can provide the necessary guidance. At its essence, this case requires a definition of Title IX's core issue: what is discrimination "on the basis of sex"?

This case presents the question squarely. The record below is well developed. The legal issues have been thoroughly explored by the opposing opinions in the Court of Appeals. The issue is not going to go away. It is a fundamental issue because the First Circuit's opinion has drastically changed the meaning of Title IX and because the OCR's adoption of the First Circuit's opinion has impacted every college and university in the country. This case presents the right opportunity for this Court to make sure that Title IX has the impact upon higher education which Congress intended. Accordingly, amici respectfully submit that this Court should review this matter and grant the Petition for Writ of Certiorari.

Respectfully submitted,

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